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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF STATES OF NEW YORK, FLORIDA, AND MINNESOTA AS *AMICI CURIAE*

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Interest of Amicus

New York, as other states, has cooperated with the federal government in its efforts to abate water pollution. Pursuant to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (the "Act" or "FWPCAA"), New York State enacted legislation designed to allow it to administer its own discharge permit system. New York Environmental Conservation Law,

Article 17, Titles 7 and 8. New York law specifically refers to the federal law in defining its purpose (E.C.L. § 17-0801) and its terms (E.C.L. § 17-0807).

The 1972 Amendments prohibit the discharge of pollutants into the navigable waters of the United States as defined in the statute, 33 U.S.C. § 1311(a), unless a permit is obtained from the U.S. Environmental Protection Agency ("EPA"), 33 U.S.C. § 1342(a). However, the Amendments allow the delegation of permit system powers to any State whose laws and regulations comply with the requirements of federal law. 33 U.S.C. § 1342(b). New York believes it will soon take over the responsibility of administering the pollutant elimination system within its borders.

New York considers it essential that it have full control over the quality of water within its boundaries when it takes over such responsibility under the Act. Only then can it exercise its constitutionally protected police powers to protect the health and welfare of its citizens. The Administrator of the U.S. Environmental Protection Agency proposes that the State permit program exclude all federal sources of pollutant discharges and that they be subject to no permit program. 40 C.F.R. 125.2(b). The New York law which sets up a State Pollutant Discharge Elimination System, E.C.L. Article 17, Titles 7 and 8, makes no distinctions between types of polluters; all are required to obtain permits. If federal facilities were held to be exempt from State permits, the State could not assure water quality standard maintenance in any stream which a federal facility was polluting. Located within New York State are Army, Navy, Coast Guard and Air Force installations, including West Point, Governor's Island and Griffiss Air Force Base, as well as numerous other federal facilities. Similarly, the States of Florida and Minnesota have many federal pollution-causing installations. Control of discharges from these sources is essential to clean water in New York and other states.

New York has already filed a brief with this Court as *amicus curiae* in a case which presents the same question with reference to the federal Clean Air Act, 42 U.S.C. § 1857f. *Kentucky ex rel. Hancock* v. *Train*, No. 74-220.

Summary of Argument

I. The Court of Appeals correctly held that federal facilities which are sources of water pollution must comply with state permit procedures established pursuant to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. The Act was passed by Congress to rid the nation of a major national disgrace, the systematic pollution of our waters by both public and private dischargers. It established a comprehensive program of federal and state cooperation in the cleanup effort. Petitioners' argument that federal facilities which are sources of pollutant discharges are exempt from state pollutant discharge elimination permit requirements is contrary to the clear wording of the Act.

Federal policy on water pollution abatement has consistently recognized the States' "primary responsibilities" in this area, and that policy is continued in the present Act. 33 U.S.C. § 1251(b). The FWPCAA requires all dischargers of pollutants to obtain a permit delineating the amount of pollutants they may discharge. 33 U.S.C. § 1342 (a). The Administrator of EPA must delegate his authority to issue permits to any state that has a permit program which meets the Act's requirements. 33 U.S.C. § 1342(c)(1).

Petitioners claim that federal facilities are free to ignore state administrative procedures for water quality control, but admit that they must meet state-applied substantive effluent limitations. But the clear language of 33 U.S.C. § 1323 requires that federal water polluters comply with state "requirements respecting control and abatement of

pollution to the same extent that any person is subject to such requirements, including reasonable service charges." The term "requirements" is used throughout the Act as a generic term and must be given its ordinary, broad meaning. It clearly does not mean just "effluent limitations," as petitioners argue.

In two sections of the Act (§ 1316 and § 1318) Congress specifically prohibited the Administrator from delegating certain of his powers over federal facilities. If Congress had chosen to exempt federal facilities from state permits, it would have done so in a similar manner.

In practice, it is virtually impossible for states to set substantive effluent limitations on federal polluters without the administrative procedures used in the permit process. Exempting federal facilities from state permits effectively exempts them from any effluent limitations.

The language of 33 U.S.C. § 1323 which requires federal facilities to pay "reasonable service charges" is further evidence that Congress intended them to be subject to state permit programs. The term "service charges" refers to permit charges as well as sewer hook-up charges.

Once a state permit program is certified by the Administrator, he can no longer issue permits in that state. 33 U.S.C. § 1342(c)(1). If federal facilities were exempt from state permits as well, they would be unregulated. Even if the Administrator were to attempt to continue to issue permits to federal facilities in a certified state, the states would be precluded from setting more stringent limitations than those required by the Act for federal facilities. This would violate 33 U.S.C. § 1320, which specifically says that states are not preempted from setting more stringent standards.

II. Petitioners argue that subjecting federal facilities to state permit procedures would violate the Supremacy Clause and the Plenary Powers Clause of the Constitution. On the contrary, the thrust of the Act as a whole is to

expand federal authority into areas which were formerly the domain of the states. States are preempted from issuing discharge permits with less stringent requirements than those of the Act. 33 U.S.C. § 1370. Delegation of permit authority from the Administrator can only be made if a state has an approvable program to control water pollution. 33 U.S.C. § 1342. Even after certification of a state permit program, much of the standard-setting authority remains with the Administrator. Congress, recognizing this, gave the states the primary responsibility for enforcement of the Act, including the enforcement against federal enclaves.

Congress fully protected federal facilities from the imposition of any unreasonable state requirements. Section 1323 allows the President to exempt any facilities from the requirements of the Act "if he determines it to be in the paramount interest of the United States to do so."

Congress has specifically authorized state regulation of federal facilities in 33 U.S.C. § 1323, meeting the test described in *Mayo* v. *United States*, 319 U.S. 441, 448, that Congress "affirmatively declare" a federal instrumentality subject to state regulation. Since violation of a state permit program is a violation of federal as well as state law, the Supremacy Clause does not absolve federal facilities from compliance.

POINT I

The Federal Water Pollution Control Act does not exempt federal sources of pollutant discharges from compliance with federally-approved state permit procedures for control and abatement of water pollution.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1251 et seq., culminating years of endeavor in designing environmental legislation to meet the awesome problems of contamination of our nation's waterways. The Act established a system

of federal-state cooperation with the goal of elimination of pollutant discharges into the waters of the United States by 1985. 33 U.S.C. § 1215(a)(1).

Petitioners here maintain that despite the clear mandate of the FWPCAA, federal facilities need not comply with state permit procedures for the discharge of pollutants into state waters, even though those same facilities concededly must meet state-applied effluent discharge limitations. The fallacy of this argument is evident not only on its face but from examination of the Act as a whole.

Federal efforts towards controlling water pollution date back to the 1899 Rivers and Harbors Act, 30 Stat. 1151, 1152, 33 U.S.C. §§ 401 et seq., which originally was applied to obstructions to navigation and was later applied to discharge of pollutants. *United States* v. *Republic Steel Co.*, 362 U.S. 482. In 1948, the Water Pollution Control Act, 62 Stat. 1155 (formerly 33 U.S.C. §§ 1151 et seq.) was enacted, declaring (§ 1)

> "the policy of Congress to recognize, preserve and protect the primary responsibility of the states in controlling water pollution."

This policy has been preserved through successive amendments of the 1948 Act into its present form. See 33 U.S.C. § 1251(b). While it has been the trend of federal legislation to progressively involve the federal government more deeply in pollution control, in the 1972 Amendments Congress continued to rely upon the states as the primary agents in the fight to clean our waters.

The Act sets up a National Pollutant Discharge Elimination System ("NPDES") which requires every "person"[1]

[1] The term "person" is defined in 33 U.S.C. § 1362(5) to mean "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a State, or any interstate body." In 33 U.S.C. § 1323 each federal facility is required to comply with "Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements . . ."

who discharges pollutants into any navigable body of water to obtain a permit. 33 U.S.C. §§ 1311, 1342(a)(1). The NPDES permit must contain effluent limitations[2] required by § 1311 for point sources,[3] which will allow the attainment or maintenance of applicable water quality standards by July 1, 1977. 33 U.S.C. § 1312. In most cases, water quality standards will be those already set by states (33 U.S.C. § 1313), so long as they conform to the requirements of the Act of "protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and to allow recreational activities in and on the water. . . ." 33 U.S.C. § 1312(a).

The Administrator is required to delegate his powers to issue permits to any state that has adequate authority to conduct its own permit system, 33 U.S.C. § 1342(b), and that has approved water quality standards. 33 U.S.C. § 1313. Thus, both "ambient" water quality and point source standards will ultimately be under state control.

The sole question before this Court involves the division of authority under the Act between the states and federal government with respect to federal facilities. Petitioners here claim that even after permit program (NPDES) powers of the Administrator have been delegated to the states, federal facilities need not comply with what they term "administrative" state permit procedures. Petitioners at the same time admit that federal facilities must comply with state applied point source effluent limitations.[4]

[2] An "effluent limitation" is a restriction in the discharge of pollutants from a point source. 33 U.S.C. § 1362(1).

[3] A "point source" is any "discernible, confined and discrete" source from which pollutants may be discharged. 33 U.S.C. § 1362(4).

[4] 40 C.F.R. 125.2 (b), a regulation of the Administrator pursuant to the FWPCAA, imposes this interpretation of the Act on states seeking approval of their permit programs.

Central to this question is 33 U.S.C. § 1323, which states:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. • • •"

Congress has here declared, in as clear language as possible, that federal facilities are not above the law, and that they must comply "with Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." This court should give this statute enacted for the protection of the public health a generous construction consistent with its plain and clearly-expressed meaning. *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232; *Tcherepnin* v. *Knight*, 389 U.S. 332, 336.

Congress specifically expressed dismay at the failure of the Federal government to lead the effort in pollution

abatement. Accordingly, Federal compliance with the new Act was strongly spelled out.

> "Evidence received in hearings [on the FWPCAA] disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. *This section requires that Federal facilities meet all control requirements as if they were private citizens.*" Senate Report No. 92-414, p. 66 (emphasis added)

Beyond the clear language of § 1323, petitioners' interpretation of the Act does not comport with its terms or overall design. They argue that the term "requirements" refers only to effluent limitations and not to administrative procedures such as state permits. This procedure-substance dichotomy which petitioners seek to employ has been denounced as a "semantical red herring" in reference to the almost identical language in the Clean Air Act. 42 U.S.C. § 1847f. *Alabama* v. *Seeber*, 502 F. 2d 1238, 1245 (1974), cert. pending No. 74-851. The term "requirements" is used throughout the Act to refer to both effluent limitations and administrative procedures. It is clearly not a term of art—nowhere is it defined in the Act. Rather, it is a generic term, to be given its ordinary meaning. If Congress had wanted to restrict its meaning, it would have referred to "effluent limitations."[5] In § 1342(b), the section dealing with state permit systems, "requirements" is used in reference to §§ 1311 and 1312 which deal with effluent limitations [33 U.S.C. § 1342(b)(1)(A)]; and also in reference to § 1318 of the statute, which deals with inspection, monitoring and entry [33 U.S.C. § 1342(b)(2)]. In

[5] Defined in 33 U.S.C. § 1362(11).

§ 1314(h), "requirements" is used to describe forms for the gathering of "information from owners and operators of point sources of discharge" subject to state permit procedures. In light of the generalized usage of the term throughout the Act, petitioners' assertion that "requirements" in § 1323 means only "effluent limitations" is illogical and totally unwarranted by any language of the Act or its intent.

In several sections of the Act, Congress expressly prohibited the Administrator from delegating his authority to regulate federal facilities. In § 1316, new federal facilities are exempted from state-applied new source standards of performance, and in § 1318 all federal facilities are exempted from state inspection, monitoring and entry requirements. Petitioners point out these specific exceptions in support of their argument, maintaining that states are barred from devising acceptable permit programs for federal facilities under § 1342(b) (Pet. Brief pp. 27-28). Quite to the contrary, the doctrine of *expressio unius est exclusio alterius* applies. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22. These exceptions show that Congress specifically exempted federal facilities where it sought to do so, and it therefore must be taken that if Congress had also desired to exempt them from state permit procedures, it would have done so. See *Alabama* v. *Seeber, supra,* 502 F. 2d at 1244. And merely because states are precluded from the right to inspect, monitor or enter federal point sources, it does not follow that states may not subject them to their permit procedures. Such a suggestion would run counter to the very purpose of a pollutant discharge elimination system.

The employment of a permit system drastically eases the administrative burden upon a regulatory agency. All dischargers of pollutants are thereby required to come forward with data showing what their effluents contain and how much, what their processes are, and what technology is available to reduce or eliminate effluents. From all this

data, as well as water quality standards, the permit agency can decide what effluent limitations shall apply to a particular point source. Without such an obligation on polluters, it would be virtually impossible to apply effluent limitations. What petitioners in essence are arguing, sub silentio, is for federal sources to be exempt from effluent limitations as well. All the specific exemptions of §§ 1316 and 1318 mean is that once a state sets effluent limitations for a federal source, only the federal EPA can enter to inspect and monitor the facility. Significantly, federal facilities are not exempted from the requirements of § 1318 to report their discharges, maintain records of them which are correlated to effluent limitations (applied by states) and to make these reports public. 33 U.S.C. § 1318(a)(A) and § 1318(b). Thus state or public enforcement against federal facilities was not intended by Congress to be precluded.

The language of § 1323 also subjects federal facilities to state or local "service charges." Petitioners here offer a narrow reading of this term, to mean sewer system user charges. However, as the court below found in rejecting this contention, sewer charges may presently be levied by a local government on a federal facility. 511 F. 2d 969, 970. Also, assuming for argument that "requirements" in § 1323 only meant effluent limitations, the phrase "including reasonable service charges" would be a *non sequitur. Id.* There are no charges for effluent limitations. Since the cost of processing a permit application is quite high, Congress most likely intended for states to be reimbursed for such costs by federal facilities in permit application charges. The term "service charges" is nowhere else used in the statute and it should be given its broad, generic meaning, consistent with the clearly-expressed need to purify the Nation's waterways, so as to include both sewer charges and permit charges.

Denying states the power to issue permits to federal facilities would leave them totally unregulated, an event

clearly obnoxious to the intent of Congress. Section 1342 (c)(1) of the statute provides that within ninety days after a state submits an approvable permit system program to the Administrator, "he *shall* suspend the issuance of permits under subsection (a) of this section (NPDES permits) . . . ." 33 U.S.C. § 1342(c)(1). In other words, the Administrator could no longer issue permits within the boundaries of the state. Accordingly, if the states were unable to issue a permit to federal facilities, no effluent limitations whatever could be imposed upon their discharges. Even petitioners concede (Pet. Brief p. 18) that such an eventuality would be inconsistent with the Act.

Petitioners' argument assumes that somehow the states would apply effluent limitations to federal facilities and those would be made effective by NPDES permits issued by the Administrator. We have already shown why this hypothetical process is not practicable; legally it would be impossible. Under § 1370 of the Act, states may enforce "(A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control and abatement of pollution" so long as it is at least as stringent as those required by this Act. Thus a state may choose to enforce more stringent requirements on polluters than the Administrator would require, but without permit authority, would be unable to effectuate those stricter standards against federal facilities. As the court below indicated,

> "some federal agencies may in fact be refusing in certain instances to comply with water quality standards established by state administrative boards." App. A, pp. 7a-8a, see n. 2.
>
> ". . . [T]he practical effect of reading Section 313 (§ 1323) so as to compel only 'substantive' federal agency compliance would be to render state permit programs ineffectual as to those dischargers, both substantively and procedurally." App. A, pp. 26a-27a.

The Court of Appeals' determination below draws much support from the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857, which were the precursor, in design, of the FWPCAA. The Clean Air Act contains a section exactly analogous to the provision now in question in the Water Act [Compare 33 U.S.C. § 1323 (Water Act), and 42 U.S.C. § 1857f (Air Act)], which is also before this Court for final determination of its meaning. *Kentucky ex rel. Hancock* v. *Train,* No. 74-220. Both Acts create a federal system for the control of pollution and place the heavy burden of enforcement mainly upon the states. While the Acts have some significant differences, a reading of one will assist the Court in interpreting the other. See Brief of the Attorney General of the State of New York as *Amicus Curiae* in No. 74-220.

POINT II

Compliance by federal instrumentalities which are sources of water pollution with federally-approved state discharge permit requirements does not violate the Supremacy Clause or the Plenary Powers Clause of the Constitution.

The petitioners in their brief recite in sober terms the supposed violence which would be done to our federal system of government if states were allowed permit authority over the discharge of pollutants from federal enclaves. They cite the Supremacy Clause (Art. VI, cl. 2) and the Plenary Powers Clause (Art. I, § 8, cl. 17) and numerous court decisions as evidence of the long tradition of federal immunity from state control.

In fact, the gloss of state intrusion into the federal prerogative which petitioners urge is no more than an illusion. Actually, the Act is an example of "new federalist" legislation, which extends federal authority into areas traditionally of state concern. While the Act's preamble

states that water pollution is primarily a state concern, 33 U.S.C. § 1251(b), the thrust of the Act is to create a Federal system for controlling water pollution until a state permit program, devised according to the Act, is approved by the Administrator of EPA. 33 U.S.C. § 1342. Even under an approved state program, the quality of waters within a state must meet federally-approved standards, 33 U.S.C. § 1313(a)(2), and point sources are required to utilize federally-specified control technology. 33 U.S.C. § 1314(b). States are preempted from setting less stringent standards than those required by the Act. 33 U.S.C. § 1370.

The legislative history of the Amendments makes clear that many Congressmen were sensitive to the extension of the federal domain to areas formerly regulated by the states. See the remarks of Reps. Blatnik (pp. 335-356), Jones (pp. 358-359) and Kluczynski (p. 363) in "A Legislative History of the Water Pollution Control Act Amendments of 1972," Vol. 1, 1973, Serial No. 93-1. The states were given the major administrative burden under the Act because Congress recognized the importance of state and local involvement to the achievement of the Act's goals. States were given the primary responsibility for enforcement of the Act, including enforcement against federal enclaves. See *Brown* v. *Environmental Protection Administration, et al.*, —— F. 2d ——, 8 E.R.C. 1053 (9th Cir. 1975), concluding that the Clean Air Act Amendments of 1970, the precursor in form to the FWPCA Amendments, would violate 10th Amendment principles if interpreted to impose sanctions upon a non-complying state. The provision interpreted, 42 U.S.C. § 1857c-8(a)(2), in the Clean Air Act is the analogue of 33 U.S.C. § 1319(a)(2) in the FWPCAA.

Nor can the spectre of unreasonable state permit requirements forcing the closing of a federal facility be realistically raised here. Section 1323 of the FWPCAA specifically allows the President to exempt any federal effluent

source from compliance with state requirements "if he determines it to be in the paramount interest of the United States to do so." This provision is intended to be used in extraordinary circumstances, however, and the President may only exempt a source for one year at a time. Certainly most federal sources will be required to comply, as they should be. Their efforts to meet state-determined effluent limitations will surely be more burdensome than compliance with state administrative regulations. Thus the argument of state-imposed burdens on federal facilities which violate the Supremacy Clause is of no merit.

Moreover, any state permit procedures which will apply to federal facilities are authorized by Congress and are, in effect, federal law. As the court below stated,

> "It is of course well established that Congress may waive exclusive jurisdiction over the activities of Federal enclaves in deference to State regulation of those activities, at least so long as in doing so it does not undermine its ultimate legislative control over these areas." (Citations omitted.) App. A, p. 10a.

In *Mayo* v. *United States*, 319 U.S. 441, 446, this Court held that "[i]t lies within the Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities." Under the FWPCA Amendments, the states act as agents of the federal government and are explicitly given the authority to regulate federal facilities. Section 1323 provides that federal agencies must comply with state "requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." This provision fully satisfies the test in *Mayo, supra*, 319 U.S. at 448, that Congress "affirmatively declare" federal instrumentalities subject to state regulations. See decision below, App. A, p. 10a.

Finally, the refusal of federal instrumentalities to comply with a state permit program is a federal offense. The

Administrator, upon approving a state permit program, delegates all of his permit-granting authority within that state and part of his enforcement powers. He retains concurrent jurisdiction to enforce any standards contained in state permits. 33 U.S.C. § 1319(3). If the violations of state permits were not violations of federal law as well as state law, the Administrator would have no authority to enforce them. (See *Getty Oil* v. *Ruckelshaus*, 342 F. Supp. 1006, 1017 (D.C. Del. 1972), mod. on other grounds 467 F. 2d 349, cert. denied 409 U.S. 1125, which held violations of state Clean Air Act plans are federal offenses enforceable by the Administrator).

The FWPCA Amendments provide that a citizen may sue to enforce "an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a)(1). These "effluent standard[s] or limitation[s]" are to be determined by a state after its program is certified. Yet even then, jurisdiction of such actions is conferred upon the federal district courts and is considered a federal question. The refusal of a federal facility to comply with state permit regulations would violate federal law, and the Supremacy Clause would not absolve it from compliance.

Unless the judgment of the Court of Appeals is affirmed, the states will be paralyzed from protecting the purity of their waterways from discharges by federal instrumentalities. This would create a double standard which Congress never envisaged, under which the same acts of non-compliance which could result in fines and penalties for a private polluter or a state or municipal agency would be, under legislation enacted by Congress, immune from permit regulation if caused by federal agencies. That double standard would severely hamper enforcement of water-quality legislation and discourage others from compliance. Nothing in the Act or the Constitution compels such an anomalous result.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated, New York, October 6, 1975.

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